Supreme Court, U.S
FILED

97 919 DEC - 2 1997

OFFICE OF THE CLERK

NO._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LORRIE RHONEMUS AND VIDEO EXPRESS,

Petitioners,

vs.

STATE OF OHIO, ex rel. STEVEN H. ECKSTEIN

Respondent.

Petition For A Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL MURRAY
(Counsel of Record)
BERKMAN, GORDON, MURRAY
& DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioners

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY
& DEVAN

QUESTION PRESENTED FOR REVIEW

1. Does a county prosecutor's agent violate the First, Fourth and Fourteenth Amendments when, without a warrant, he copies onto a blank tape, the entire contents of two videotapes he has rented from a neighborhood videostore, for the purpose of using the copy as evidence against the videostore and its owner in future obscenity proceedings?

LIST OF PARTIES

The petitioners in this case are Video Express, a sole proprietorship, and Lorrie Rhonemus, its owner and operator.

The respondent in this case is the State of Ohio through Steven H. Eckstein, the Prosecutor of Fayette County, Ohio.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 15

APPENDICES

Opinion of the Court of Appeals for the Twelfth Appellate District (April 28, 1997) 1a

Judgment Entry of the Court of Appeals for the Twelfth Appellate District (April 28, 1997) 19a

Entry of the Supreme Court of Ohio (September 3, 1997) 21a

Judgment Entry on Remand of the Court of Common Pleas of Fayette County (July 1, 1997) 22a

TABLE OF CONTENTS (cont'd)

Page

Original Order of the Court of Common Pleas of Fayette County (April 26, 1995) 24a

Notice of Voluntary Dismissal without Prejudice 26a

Constitution of the United States

First Amendment 28a

Fourth Amendment 28a

Fourteenth Amendment 28a

Ohio Revised Code

§ 3767.01 Ohio Revised Code 30a

§ 3767.02 Ohio Revised Code 31a

§ 3767.03 Ohio Revised Code 31a

§ 3767.04 Ohio Revised Code 32a

§ 3767.05 Ohio Revised Code 35a

§ 3767.06 Ohio Revised Code 36a

§ 2907.01 Ohio Revised Code 39a

§ 2907.32 Ohio Revised Code 42a

§ 2913.02 Ohio Revised Code 43a

TABLE OF CONTENTS (cont'd)

Page

Propositions of Law to the Ohio Supreme Court 44a

Assignments of Error to Court of Appeals for the Twelfth Appellate District 45a

TABLE OF AUTHORITIES

Page

CASES

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) . . . 5

Katz v. United States, 389 U.S. 347 (1967) 11

Lewis v. United States, 385 U.S. 206 (1966) 12

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319 (1979) 11

Maryland v. Macon, 472 U.S. 463, 469 (1985) 11-13

Miragaya v. Florida, 654 So.2d 262
(2d Dist. Fla.), cert. denied,
___ U.S. ___, 116 S.Ct. 518 (1995) 13, 14

Roaden v. Kentucky, 413 U.S. 496 (1973) 12

Stanford v. Texas, 379 U.S. 476 (1977) 12

U.S. v. Jacobsen, 466 U.S. 109 (1984) 11

CONSTITUTIONAL PROVISIONS

United States Const., amend. I 2, 5, 10, 11

United States Const., amend. IV 2, 5, 10-12, 14

United States Const., amend. XIV 2, 5

TABLE OF AUTHORITIES (cont'd)

Page

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. §1983 . . . . . 4, 10, 11

42 U.S.C §1988 4

Ohio Rev. Code §2721.01 4

Ohio Rev. Code §2907.01 2

Ohio Rev. Code §2907.32 . . . . . 2, 4

Ohio Rev. Code §2907.37 4

Ohio Rev. Code §2913.02 . . . . . 2, 13

Ohio Rev. Code §3767.01 . . . . . 2, 4

Ohio Rev. Code §3767.02 2

Ohio Rev. Code §3767.03 2

Ohio Rev. Code §3767.04 2

Ohio Rev. Code §3767.05 2

Ohio Rev. Code §3767.06 2

NO._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LORRIE RHONEMUS AND VIDEO EXPRESS,

Petitioners,

vs.

STATE OF OHIO, ex rel. STEVEN H. ECKSTEIN

Respondent.

Petition For A Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Lorrie Rhonemus and Video Express, petitioners herein, pray that a writ of certiorari issue tc review the judgement of the Ohio Supreme Court entered in this case on September 3, 1997.

OPINIONS BELOW

The Ohio Supreme Court Judgment Entry dismissing the appeal as not involving any substantial constitutional question is set forth in the Appendix at App. 21. The opinion of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District, is set forth at App. 1. The Judgment Entry of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District, is set forth at App. 19. The Judgment Entry of the trial court on remand is set forth at App. 22. The original Order of the trial court is set forth at App. 24.

JURISDICTION

The Order of the Court of Common Pleas, Fayette County, Ohio, ordering the closure of Video Express was entered on April 26, 1996. App. 24. The opinion and judgment entry of the Court of Appeals for Fayette County, Ohio, Twelfth Appellant District, were entered on April 28, 1997. App. 1, 19. The trial court's Judgment on remand was entered on July 1, 1997. App. 22. Petitioner Rhonemus' dismissal of her counterclaim against the respondent was entered on August 22, 1997. App. 26. The judgment of the Ohio Supreme Court was entered on September 3, 1997. App. 21. This Court has jurisdiction to review the final judgment rendered by the highest court of a state by writ of certiorari pursuant to §28 U.S.C. 1257, where rights are claimed under the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Fourth, and Fourteenth Amendments to the United States Constitution are set forth at App. 28. Ohio Revised Code Sections 3767.01, 3767.02, 3767.03, 3767.04, 3767.05, 3767.06, 2907.01, 2907.32 and 2913.02 are reprinted in the Appendix at App. 30-43.

STATEMENT OF THE CASE

In 1993, Lorrie Rhonemus, one of the petitioners herein, purchased a small, general neighborhood videostore known as Video Express. Video Express was located in a commercial district of Washington Courthouse, Ohio in the upstairs of a building owned by a third party, and offered videotapes for rental from two rooms. The main room contained approximately 1,200 family-oriented, general release videotapes for rental. A second room, which was separate from the main room and displayed a sign restricting entrance to those over age 21, contained about 345 videotape box covers representing adult-oriented videotapes available for rental.

On June 24, 1994, the Prosecuting Attorney for Fayette County, Ohio, respondent herein, sent a letter to Ms. Rhonemus concerning the content of certain videotapes in her inventory. Specifically, the respondent complained that her store offered to rent sexually explicit material to the public that might be in violation of Ohio's obscenity laws. Respondent advised Ms. Rhonemus to review her inventory and threatened civil and criminal prosecution against her if sexually explicit videotapes continued to be made available for rental to the public. He further advised her that his office would be reviewing the situation in approximately 30 days.

Nine months later, the respondent sent his investigator, William Robinson, to Video Express to determine if the sexually explicit videotapes had been removed from the shelves. Specifically, on March 1, 1995, Mr. Robinson went to Video Express and found sexually explicit materials were still available for rental. As such, he paid $2.50 to rent an x-rated videotape and removed it from the premises. Mr. Robinson returned to Video Express the next day and paid $2.50 to rent a second x-rated videotape.

Prior to renting the two videotapes, Mr. Robinson was required to complete an application for rental which contained a clause specifically prohibiting Video Express patrons from dubbing, i.e., copying, the rented videotapes. However, and despite the fact that he completed the application and knew he was prohibited from making copies of the rented material, and despite the fact that the respondent also knew that the rental agreement prohibited copies of the rented material from being made, respondent directed his investigator, without a warrant, consent or any other exigency, to mechanically reproduce the videotapes he rented from Video Express onto a single blank videocassette. The videotapes were then returned to the store, and the videocassette copy was taken to the respondent's office for use as evidence against Ms. Rhonemus and Video Express.

The next day, March 3, 1995, the respondent brought a complaint against Video Express and Lorrie Rhonemus pursuant to §2907.37 Ohio Rev. Code. In it, the respondent sought to permanently enjoin the rental of the two videotapes that had been copied by his investigator. Two weeks later, the respondent amended his complaint to seek closure of Video Express as a public nuisance under §3767.01, et seq., Ohio Rev. Code. In the amended complaint, the respondent alleged Video Express was a public nuisance because it had engaged in repeated violations of §2907.32, Ohio's criminal pandering obscenity statute. The "repeated violations" to which the amended complaint referred were the rentals by the respondent's investigator on March 2 and 3, 1995.

Ms. Rhonemus and Video Express filed a timely Answer, and in addition, Ms. Rhonemus filed a counterclaim against the respondent pursuant to 42 U.S.C. §§1983, 1988, and Ohio Rev. Code §2721.01 et seq. In it, she sought a declaratory judgment that the respondent's June 24, 1994 letter constituted an attempt to impose an unconstitutional prior restraint upon her and attempted to chill her right to

freedom of expression, see Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), and requested the videotapes to be declared constitutionally protected expression. On motion of the respondent, the trial court dismissed the counterclaim.

In the petitioners' Answer to the Complaint and in their separately filed pre-trial Motion to Suppress and/or In Limine, the petitioners alleged the unauthorized copying of the rented videotapes was an illegal seizure prohibited by the First, Fourth and Fourteenth Amendments to the United States Constitution, and as a result, that the copy should be suppressed from use as evidence at trial. The trial court overruled the motion during trial.

Trial began on April 2, 1996. The only evidence offered by the respondent was testimony describing how the videotapes were acquired and the unauthorized copy of the videotapes themselves. During their testimony, both the respondent and his investigator conceded they knew the terms of the rental agreement prohibited them, like any other customer, from copying the videotapes, and in fact, the following colloquys took place during cross-examination of the respondent and his investigator:

MURRAY: . . . Mr. Eckstein when you instructed Mr. Robinson to go rent video tapes was it your intention that uh, that uh you would thereafter instructed him uh to make a copy of the video tapes that he rented?

ECKSTEIN: Yes. . . . .

Trial Transcript at 45.

MURRAY: And your understanding was that it was a rental transaction correct?

ECKSTEIN: That's correct.

MURRAY: And your understanding of a rental transaction is that someone pays money for the right to watch the video tape that is rented. That's the ordinary understanding of rental isn't it?

ECKSTEIN: Yes.

MURRAY: And that the following day whenever the rental period is over the person would return the video tape to the store correct?

ECKSTEIN: Correct.

MURRAY: Because you understood that in the ordinary course of things the owner of that video tape would be the store that was renting it, correct?

ECKSTEIN: That's correct.

MURRAY: And you would understand that in the ordinary meaning of the term rental it would not include the right to make a copy of the video tape for the customer to keep, you would understand that to be the ordinary understanding of rental wouldn't you?

ECKSTEIN: Yes.

Trial Transcript at 48.

MURRAY: And you understood as of March of 1995 it was your expectation that the uh that you could only rent tapes there . . . .

MURRAY: And you expected to pay a nominal or reasonable rental charge is that correct?

ROBINSON: That's correct.

MURRAY: And you did pay a reasonable rental charge correct?

ROBINSON: Yes. . . . .

MURRAY: In any event uh you understood that you were renting the tape not purchasing it?

ROBINSON: Yes.

MURRAY: And that uh it would remain the property of the video store, correct?

ROBINSON: Yes.

MURRAY: And that you would be obligated to return it the next day or pay a late charge, correct?

ROBINSON: That s correct.

MURRAY: And if you wanted to uh watch the tape again after that day you understood that you would be required to rent it again and pay another rental charge, correct?

ROBINSON: That's true.

MURRAY: As a matter of fact you did that the next day, correct?

ROBINSON: Yes I did.

MURRAY: You told them that you wanted to watch it again, you implied that you wanted to watch it again and they said well you're gonna have to pay another rental charge.

ROBINSON: That's true. . . .

MURRAY: You didn't have any permission from the store to uh make a copy of their tape did you?

ROBINSON: No I didn't.

Trial Transcript at 99-100.

In their defense, the petitioners offered the testimony of an expert and of Ms. Rhonemus to support their contention that the videotapes were not obscene. In addition, Ms. Rhonemus's explained how she came to purchase Video Express, how she selected the specific videotapes offered for rental and how she limited the adult videotape inventory to videotapes containing a plot that she believed her customers, average adult members of the Fayette County community, would find acceptable.

Ms. Rhonemus also described the rental process and the application to be filled out by each of her patrons, including respondent's investigator, prior to renting a videotape. The following testimony was elicited:

KOCAB: And prior to his renting a tape, did he have to fill out an application?

RHONEMUS: Yes he did.

KOCAB: And uh what information is on that application?

RHONEMUS: Um your name, your telephone number, where you live at, um and your driver's license number?

KOCAB: Is there any directive on that application regarding the store's policy?

RHONEMUS: Yes, there's um about a paragraph and a half on the application itself.

KOCAB: And what does that tell the renter about renting these tapes?

RHONEMUS: More-or-less that he can not dub the tapes, that is . . . that it is to be brought back within the time span, um that he's responsible for any lost or stolen property, and attorney fees if I prosecute.

KOCAB: Okay, when you say he's not to dub the tapes, what do you mean by that?

RHONEMUS: Take [sic] [tape] them for his benefit for his library at home.

Trial Transcript at 178.

At the conclusion of the evidence, the trial court immediately found the videotapes obscene, found the rentals constituted "repeated" violations of the criminal pandering obscenity statute, and as a result, found Ms. Rhonemus was operating Video Express as a nuisance. Thereafter, the court ordered the imposition of the remedies permitted by Ohio's nuisance statute. The statutory remedies include closure of the premises for any purpose for one year, the imposition of a permanent injunction, a $300.00 tax and the confiscation and sale of the property used in conducting the nuisance. App. 30-36. Here, the court ordered the sheriff to confiscate the two videotapes, two shelves, the cash register and a counter from the premises, and ordered the sale of each of these items except the two videotapes. App. 24. The court further ordered the closure of Video Express for any purpose for a period of one year, commencing April 26, 1996, and denied petitioners' request for release from the closure order. Thus, the trial court effectively granted the respondent's request to put Ms. Rhonemus' general

neighborhood video store completely out of business solely because she failed to capitulate to his demand that she remove sexually explicit materials from her shelves.

Video Express and Ms. Rhonemus filed a timely appeal to the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District, raising seven assignments of error, including that the trial court erred in failing to suppress the unauthorized copies of the videotapes from evidence. App. 45. On April 28, 1997, the court of appeals rendered a decision affirming in part, reversing in part and remanding the case to the trial court for further proceedings. Specifically, the appellate court determined that the trial court had erroneously dismissed Ms. Rhonemus's counterclaim against the Fayette County Prosecutor under 42 U.S.C. §1983, had erroneously issued an ex parte temporary restraining order, and had issued an abatement order that was unnecessarily broad. App. 6-7, 12-17. The appellate court denied petitioners' requested relief on the remaining assignments of error, and with regard to the Fourth Amendment issue, held the copying of the videotapes was not an unreasonable seizure, despite the fact that there was no warrant, consent or any exigency. App. at 3-4.

The case was remanded to the trial court on April 28, 1997. On July 1, 1997, the trial court issued a Judgment Entry complying with the appellate court's directive to amend its closure order to adhere to the requirements of the First Amendment. App. 22. By that time, however, the overly broad one year closure order reversed by the appellate court already had expired. All other remedies previously imposed by the trial court remained in effect.

Shortly thereafter, on August 22, 1997, Ms. Rhonemus filed a notice of voluntary dismissal without prejudice of her §1983 counterclaim against the respondent, App. 26, thus rendering the appellate court judgment final. On September 3, 1997, the Ohio Supreme Court declined to exercise jurisdiction over the case and dismissed the appeal,

and Ms. Rhonemus now petitions this Court for a writ of certiorari. App. 21.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to correct the clear and obvious constitutional error committed by the lower court's finding that the Fourth Amendment, in the course of an investigation of a videostore for violation of the state's criminal and civil pandering obscenity laws, does not prohibit a law enforcement officer from bypassing the Fourth Amendment's warrant requirement by renting a videotape, making an unauthorized copy of the videotape and retaining it for use as evidence against the store and its owner in proceedings initiated for the purpose of putting the store out of business. The lower court's error is particularly glaring in light of the undisputed testimony that the rental agreement prohibited patrons from copying the rented materials, and further in light of the respondent's concession that he knew the rental agreement prohibited the very activity in question.

The Fourth Amendment protects against unreasonable searches and seizures of property in which the owner possesses a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967). A seizure occurs when the government interferes with an owner's possessory interest in property. Maryland v. Macon, 472 U.S. 463, 469 (1985) (citing U.S. v. Jacobsen, 466 U.S. 109, 113 (1984)).

> The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5, . . . (1979, and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances. Stanford v. Texas, 379 U.S. 476, 485 . . . (1965). Consequently, the court has imposed

> particularized rules applicable to searches for an seizures of allegedly obscene films, books, and papers. See, e.g., Roaden v. Kentucky, 413 U.S. 496, 497 . . . (1973).

Maryland v. Macon, 472 U.S. at 468.

In Macon, this Court examined these principles to determine whether the purchase of expressive materials for use as evidence violated the Fourth Amendment. This Court answered that question in the negative and did so because in a situation involving an outright sale of expressive material, the seller voluntarily transfers his entire possessory interest in the materials to the purchaser upon receipt of the purchase price. 472 U.S. at 469. This Court noted that after the sale was completed, "whatever possessory interest the seller had was in the funds, not the magazines," and thus concluded that "[a]t the time of the sale the officer did not 'interfere' with any interest of the seller; he took only that which was intended as a necessary part of the exchange." 472 U.S. at id. (citation omitted) (citing Lewis v. United States, 385 U.S. 206, 210, 211 (1966)).

This case presents a factual scenario one step removed from Macon and is deserving of this Court's attention for the reason that this Court has not analyzed the Fourth Amendment in the context of a rental of expressive material. The rental and concomitant limitations placed on the transfer of Ms. Rhonemus' possessory interest in the videotapes by virtue of the rental, raises an important distinction between this case and Macon, for here, Lorrie Rhonemus did not transfer her entire possessory interest in the videotapes to respondent. Rather, Ms. Rhonemus transferred an extremely limited, temporary possessory interest in the videotapes to Mr. Robinson, which limited transfer removes this case from the confines of Macon.

As noted supra., Ms. Rhonemus rented each of the two

videotapes to Mr. Robinson for a fee of $2.50. Mr. Robinson completed an application prior to removing the tapes from the premises, and the terms of the rental agreement specifically prohibited him from copying the tapes and required him to return the tapes to Video Express after one day. Indeed, the purpose of renting the videotapes, as opposed to selling them, was to generate a fee for each day a customer wished to retain the tape or its contents. Thus, for each day Mr. Robinson retained the videotapes, he was required to pay a daily fee of $2.50. By copying the videotapes and retaining the copy, Mr. Robinson deprived Lorrie Rhonemus of her daily rental fee.

Unlike Macon, the circumstances of this case do not support the conclusion that Ms. Rhonemus transferred her entire possessory interest in the videotapes to Mr. Robinson, and instead, they establish that she transferred only a limited possessory interest in the videotapes to Mr. Robinson for the purpose specifically set forth in the rental agreement. Thus, when Mr. Robinson copied these videotapes without Ms. Rhonemus' authorization and without an additional payment to her of any kind, he interfered with the possessory interest in the tapes that Ms. Rhonemus had reserved for herself by the limited nature of the rental transaction.

A similar factual scenario was before Florida's Second District Court of Appeals in Miragaya v. Florida, 654 So.2d 262 (2d Dist. Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 518 (1995), where, as here, agents of the State rented sexually explicit videotapes, copied them for use as evidence and subsequently returned the originals to the store. 654 So.2d at 263. The trial court suppressed the videotapes from use as evidence but the circuit appellate court reversed. On a petition for writ of certiorari to the District Court of Appeal, that court held the copies of the videotapes were properly suppressed from evidence because the unauthorized copying interfered with the video store owner's possessory interest in the videotapes. Id. at 264.

The same conclusion is warranted here, for here the respondent similarly interfered with Ms. Rhonemus' possessory interest in the videotapes, and as a result, the tapes should have been suppressed from use as evidence.

This case presents the Court with the opportunity to delineate the difference between this case and Macon, and to provide guidance to future courts facing similar questions. Petitioners thus request this Court to accept this case to address the specific and narrow question whether an illegal seizure occurs when an agent for the prosecutor rents videotapes and knowingly and intentionally contravenes the rental agreement by making copies of the videotapes without a warrant, consent or any exigency, and retains the copy for use as evidence against the videotapes' owner in future obscenity proceedings.

The petitioner asserts this question should be answered in the affirmative and requests this Court to accept this case to address this important constitutional issue.

CONCLUSION

For these reasons, petitioners, Lorrie Rhonemus and Video Express respectfully request this Court to accept this case for review.

J. MICHAEL MURRAY (0019626)
(Counsel of Record)
BERKMAN, GORDON, MURRAY
& DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioners

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY
& DEVAN

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO ex rel. STEVEN H. ECKSTEIN,	:	CASE NO. CA96-05-014
Plaintiff-Appellee,	:	
-vs-	:	OPINION
VIDEO EXPRESS, et al.,	:	4/28/97
Defendants-Appellants.	:	(Filed Apr. 28, 1997)

Steven H. Eckstein, Fayette County Prosecuting Attorney, 214 W. Market Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Berkman, Gordon, Murray & DeVan, J. Michael Murray, Brooke F. Kocab, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, for defendants-appellants

YOUNG, P.J. Lorrie Rhonemus, sole proprietor of defendant-appellant, Video Express, appeals a Fayette County Court of Common Pleas nuisance abatement order that closed her videotape rental store for one year. Rhonemus sets forth several difficult statutory and constitutional issues within seven assignments of error. Rhonemus operated Video Express in Washington Courthouse, Fayette County, Ohio. The video store carried about 1,200 general release videotapes in a main room. Rhonemus also offered about 345 "adult-oriented"

videotapes in a smaller, separate room with access restricted to those over age twenty-one. In June 1994, the Fayette County Prosecutor, Steven H. Eckstein, sent Rhonemus a letter directing her attention to Ohio's pandering obscenity statute, R.C. 2907.32. The prosecutor informed Rhonemus that certain videotapes she offered appeared to be obscene. According to the prosecutor, those tapes "depicted numerous acts of vaginal and/or anal intercourse, fellatio, and cunnilingus."

On March 2, 1995, an investigator with the prosector's office rented two videotapes from Video Express, copied those tapes, and returned the originals to the store. On March 3, the prosecutor filed a complaint under R.C. 2907.37(A) to enjoin Rhonemus from renting the two videotapes. The trial court granted the state's request for an ex parte temporary restraining order on March 6. On March 17, the prosecutor amended his complaint to allege a civil nuisance under R.C. 2907.37(B) and R.C. Chapter 3767. The amended complaint alleged that Video Express should be abated as a nuisance for repeatedly renting obscene videotapes to the public in violation of R.C. 2907.32. At the prosecutor's request, the trial court dissolved the temporary restraining order on March 24.

Rhonemus filed an answer and counterclaim on April 7, 1995. The counterclaim alleged that the prosecutor's June 1994 letter was an unconstitutional attempt to impose a prior restraint on her First Amendment rights in violation of 42 U.S.C. Section 1983. Rhonemus also sought a declaratory judgment that the two videotapes were not obscene. The trial court dismissed Rhonemus' counterclaim in both regards. The trial court subsequently overruled Rhonemus' motion to suppress the copied videotapes as evidence. The trial court also denied her request to seat an advisory jury.

After a trial before the court on April 2, 1996, the trial judge found that the two videotapes were obscene, that Rhonemus knew they were obscene, and that their rental constituted a nuisance. The trial court ordered the entire video store closed for one year and ordered certain property associated with the rental of the videotapes sold at auction. Rhonemus asked for a release from the closure order, but the trial court denied that request because Rhonemus leased the premises.

On appeal, Rhonemus sets forth seven assignments of error. Rhonemus' first three assignments of error raised several threshold issues. This court will consider Rhonemus' second assignment of error first.

Rhonemus complains under her second assignment of error that the trial court erred in not suppressing the copied videotapes as evidence. This court disagrees.

"Absent some action taken by government agents that can properly be classified as a 'search' or 'seizure,' the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply." Maryland v. Macon (1995), 472 U.S. 463, 469, 105 S.Ct. 2778, 2782 (examination and purchase of materials in adult bookstore did not constitute a search or seizure). There was no illegal search here since Rhonemus had no reasonable expectation of privacy over videotapes that she rented to the public. See Id. The critical issue is whether the state's act of copying the videotapes amounted to an unconstitutional seizure. See State v. Pink Pyramid (Oct. 18, 1995), Hamilton App. No. C-940930, unreported at 4.

A seizure occurs when "there is some meaningful interference with an individual's possessory interests in the property seized." Macon at 469, 105 S.Ct. at 2782. This court concludes there was no seizure in this case. There is

no indication that the state violated any express terms of the rental. Compare Pink Pyramid (where police rented a videotape, held the tape longer than the stated rental period and paid applicable late fees, there was no seizure because there was no meaningful interference with the owner's possessory interest in the tape). There is also no indication that Rhonemus holds a copyright over the contents of the videotapes. Rhonemus has offered no other compelling explanation of how the state compromised her possessory interest in the videotapes. Under these circumstances, the trial court did not err in refusing to suppress the copied videotapes as evidence. Rhonemus' second assignment of error is overruled.

Rhonemus complains under her first assignment of error that the trial court erred in dismissing her counterclaims. There are two distinct issues here: whether the trial court erred in dismissing Rhonemus' 42 U.S.C. Section 1983 claim against Prosecutor Eckstein, and whether the trial court erred in dismissing her motion for a declaratory judgment.

Rhonemus first argues that the trial court should have proceeded with her motion for a declaratory judgment. The trial court did not abuse its discretion in dismissing that motion, although the reasoning the trial court employed was faulty.

The trial court cited R.C. 2907.36(C) in denying Rhonemus' request for a declaratory judgment. That statute does not apply here, however, because neither party filed a motion for a declaratory judgment under R.C. 2907.36. Even if the trial court properly considered R.C. 2907.36, that statute expressly provides that it places no limitations "on the persons otherwise entitled to bring an action for a declaratory judgment pursuant to sections 2721.01 to 2721.15 ***."

Although R.C. 2907.36(C) does not support the trial court's position, the trial court did not abuse its discretion in dismissing the motion for a declaratory judgment. The Ohio Supreme Court has said that actions for declaratory judgment are inappropriate where "special statutory proceedings" would be bypassed. State ex rel. Albright v. Delaware Cty. Ct. of Com. Pleas (1991), 60 Ohio St.3d 40, 42. Prosecutor Eckstein filed both his original and amended complaints before Rhonemus sought a declaratory judgment; Rhonemus was trying to bypass an existing action. In light of the pending proceedings, the trial court did not abuse its discretion in dismissing the declaratory judgment motion.

The trial court also dismissed Rhonemus' Section 1983 complaint against Prosecutor Eckstein. That complaint was based upon the prosecutor's June 1994 letter to Rhonemus. "A cause of action under Section 1983 must allege that a person, acting under color of law, deprived the plaintiff of a constitutionally guaranteed federal right." Conley v. Shearer (1992), 64 Ohio St.3d 284, 294. An action will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claim. See Conley v. Gibson (1957), 355 U.S. 41, 45, 78 S.Ct. 99, 102.

The trial court dismissed the Section 1983 claim on procedural due process grounds, stating that "defendant has not been deprived of any right to be heard." The trial court, however, misunderstood or ignored Rhonemus' claim that the prosecutor's letter was part of an effort to impose a prior restraint on constitutionally protected expression. A Section 1983 claim based upon deprivation of the First Amendment guarantee of free speech is always available regardless of supplemental state remedies. Cooperman v. University Surgical Assoc. (1987), 32 Ohio St.3d 191, 199.

Rhonemus set forth a viable claim under Section 1983, and the state all but concedes that the trial court erred in dismissing that complaint. The state argues, however, that any error was harmless. This court cannot agree. The prosecutor's June 1994 letter did not refer to any specific title and only offered guidance that a grand jury had found videotapes obscene that "depicted numerous actions of vaginal and/or anal intercourse, fellatio, and cunnilingus." The state argues that this description fits within the definition of obscenity set forth in R.C. 2907.01(F). That statutory definition, however, must be "authoritatively construed" to incorporate the guidelines prescribed in Miller v. California (1973), 413 U.S. 15, 93 S.Ct. 2607. State v. Burgun (1978), 56 Ohio St.2d 354, paragraph one of the syllabus. The prosecutor's description of obscene material could include expressive material that is not obscene under the guidelines established in Miller. Therefore, the letter could be construed as an attempt to impose a prior restraint on Rhonemus' constitutional right to free speech. The trial court's decision dismissing Rhonemus' Section 1983 complaint was not harmless error.

To summarize this assignment of error, the trial court did not abuse its discretion in denying Rhonemus' motion for a declaratory judgment. The trial court did, however, err in dismissing her Section 1983 complaint against Prosecutor Eckstein. Rhonemus' Section 1983 action must be reinstated. Rhonemus' first assignment of error is sustained in part and overruled in part.

Rhonemus complains in her third assignment of error that the trial court erred in issuing an ex parte temporary restraining order on March 6, 1995. She argues the trial court did not follow Civ.R. 65(A) before issuing the ex parte order. Rhonemus' argument is well-taken, but there is no reversible error.

A trial court can issue an ex parte temporary restraining order "only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result ***, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be require." Civ.R. 65(A). The requirements of Civ.R. 65(A) are mandatory, not merely directory. North Electric Co. v. United Steelworkers of America (1971), 28 Ohio App.2d 253, 259; Octa v. Interstate Adult Arcade (Oct. 17, 1994), Fayette App. No. CA94-04-002, unreported at 11-12. Without a showing of prejudice, however, non-compliance with the mandatory requirements of Civ.R. 65(A) may constitute harmless error. North Electric at 259-60.

The prosecutor and the trial court ignored the requirements of Civ.R. 65(A). The prosecutor set forth no specific facts to demonstrate that "immediate and irreparable injury, loss or damage [would] result to the applicant before the adverse party or his attorney [could] be heard in opposition."[3] The prosecutor also did not "certif[y]

---

[3] In his affidavit attached to his request for the ex parte temporary restraining order, the prosecutor simply stated:

> I view ["Black Stockings"] and it contained scenes of male and female participants engaged in cunnilingus, fellatio, and vaginal intercourse and ejaculation.
>
> I view *** "Everything Butt" [and it] contained scenes of males and females engaged in cunnilingus, fellatio, vaginal and anal intercourse and ejaculation. The only difference between the

to the court in writing the efforts, if any, made to give notice and the reasons supporting his claim that notice should not be required." See Civ.R. 65(A). The trial court did not "define the injury [or] state why it is irreparable and why the order was granted without notice ***" as required by Civ.R. 65. In its March 6 judgment entry, the trial court concluded simply "that the issuance of such Temporary Restraining Order is permissible ex parte [sic] under R.C. 2727.01." (Emphasis added.) R.C. 2727.01 was repealed in 1971. Civ.R.65 is controlling.

The trial court ignored the requirements of Civ.R. 65 in issuing its ex parte temporary restraining order. Rhonemus' third assignment of error is sustained. The trial court, however, dissolved the ex parte temporary restraining order on March 24, 1995. Rhonemus has not come forward with any indication that she was prejudiced by the trial court's imposition of the ex parte order. The trial court's issuance of the improper order provides no basis to reverse the trial court's subsequent orders.

The remaining four assignments of error are related to the trial court's nuisance abatement order against Video Express. Rhonemus complains under her fourth assignment of error that the trial court's one year closing order was unconstitutional. She argues under her fifth assignment of error that the court improperly found "repeated violations" of the criminal prohibition against pandering obscenity. In her sixth assignment of error, Rhonemus contends that the trial court abused its discretion in refusing to empanel an advisory jury. Finally, Rhonemus argues that the trial court erred in concluding that the videotapes at issue were

---

films was the participants and the filming locations. Both films basically contain the exact depictions.

obscene. This court will address Rhonemus's fourth assignment of error last.

Rhonemus argues in her fifth assignment of error that the trial court erred in finding that she had repeatedly violated Ohio's pandering statute. The crux of her argument is that the state cannot establish "repeated violations" of the prohibitation against pandering obscenity in a civil proceeding without providing the same procedural safeguards available to a criminal defendant charged with violating the underlying pandering statute. Rhonemus specifically complains that she was entitled to a jury determination on the issue of obscenity.

R.C. 3767.01(C) provides in part that a nuisance is "that which is defined and declared by statutes to be such ***." R.C. 2907.37(B) provides that premises used for "repeated violations" of the criminal obscenity statutes, R.C. 2907.31 and R.C. 2907.32, are a nuisance subject to abatement pursuant to R.C. Chapter 3767. R.C. 2907.37(B) is silent on whether repeated violations of the pandering statute must be determined with the same procedural safeguards available to a criminal defendant, i.e., a right to a jury trial and to a greater burden of proof for the state.

There is no federal constitutional mandate requiring a jury trial in state civil proceedings. See Alexander v. Virginia (1973), 413 U.S. 836, 93 S.Ct. 2803, 2804. In Ohio, it is well settled that there is no right to a jury trial in a nuisance abatement action. State ex rel. Miller v. Anthony (1995), 72 Ohio St.3d 132, paragraph one of the syllabus. Importantly, in Anthony the supreme court held that when the state offers clear and convincing evidence that felony violations of R.C. Chapter 2925 chronically occur on a parcel of property, that evidence is sufficient to establish a nuisance. Id. at paragraph three of the syllabus. See, also, State v. Warjack (Mar. 11, 1996), Madison App. No. CA95-

08-023, unreported.

The reasoning and result in Anthony suggest that there is no right to a jury trial in a nuisance abatement action even where the underlying nuisance is based upon a criminal statute. In light of Anthony, this court concludes that the state may attempt to establish "repeated violations" of R.C. 2907.32 during the civil nuisance abatement action. Rhonemus' fifth assignment of error is overruled.

Rhonemus complains under her sixth assignment that the trial court erred in denying her request for an advisory jury. Civ.R. 39(C) provides that "[i]n all actions not triable of right by a jury (1) the court *** may try any issue with an advisory jury." (Emphasis added.) The civil rule expressly provides that the decision to seat an advisory jury is discretionary, and this court will not reverse a trial court's decision not to seat such a jury absent an abuse of discretion.

Although the Ohio Supreme Court has suggested that juries my be better suited than judges to make an obscenity determination, Urbana, ex rel. Newlin v. Downing (1989), 43 Ohio St.3d 109, 113 at fn. 4,[4] this court is not convinced

---

[4] In Urbana, the supreme court stated:

> A jury may well be better equipped for the task of determining contemporary community standards that a judge, since a jury represents a cross section of a community and has a special aptitude for reflecting the view of the average person. There is a close analogy between the function of "contemporary community standards" in obscenity cases and

that the trial court abused its discretion in not seating an advisory jury. Rhonemus' sixth assignment of error is overruled.

Rhonemus' complains under her seventh assignment of error that the trial court erred in concluding that the two videotapes were obscene. This court is obligated to make an independent judgment on whether the material involved is constitutionally protected. Miller, 413 U.S. at 25, 93 S.Ct. at 2615; Jacobellis v. Ohio (1964), 378 U.S. 184, 190, 84 S.Ct. 1676, 1679 (in obscenity cases, as in all other First Amendment cases, the court cannot avoid making an independent constitutional judgment on the facts of the case).

R.C. 2907.01(F) defines obscenity in Ohio. That statutory definition must be construed together with the guidelines established in Miller. Burgun, 56 Ohio St.2d at paragraph one of the syllabus. Miller described the permissible scope of state regulation of obscenity as follows:

> State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such

---

> "reasonableness" in other cases. "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States (1974), 418 U.S. 87, 104-105 [,94 S.Ct. 2887, 2901].

> regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Id. at 23-24, 93 S.Ct. at 2614-15 (Citation and footnote omitted).

"When the judge is the trier of fact in an obscenity case, the situation here, he must gauge the reaction of the community when and as if the 'average person' viewed the material." Urbana, ex rel. Newlin, 43 Ohio St.3d at 113. This court has independently reviewed the videotapes. Both videotapes depict sexual conduct specifically defined in R.C. 2907.01(A). This court is also satisfied that an "average person" would conclude that the material meets the three guidelines set forth in Miller. The trial court did not err in finding the videotapes obscene. Rhonemus' seventh assignment of error is overruled.

In her fourth assignment of error, Rhonemus complains the trial court's order closing Video Express was an unconstitutional prior restraint in violation of the First Amendment. Although this court does not agree with all of the arguments Rhonemus makes in this assignment of error, this court is convinced that the trial court abused its discretion in issuing an overly broad abatement order.

Application of the one year closing order in this case raises serious constitutional issues. The First Amendment protects motion pictures as fully as other mediums of

expression. Joseph Burstyn, Inc. v. Wilson (1952), 343 U.S. 495, 72 S.Ct. 777 ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform"). Obscenity is not protected expression. Roth v. United States (1957), 354 U.S. 476, 77 S.Ct. 1304. However, since obscenity is often separated from protected expression only by a "dim and uncertain line," regulation must be accomplished through "procedures that will ensure against the curtailment of constitutionally protected expression." Bantam Books v. Sullivan (1963), 372 U.S. 58, 66, 78 S.Ct. 631, 637 (any system of prior restraints of expression bears a heavy presumption against its constitutional validity).

The regulation of obscenity through a civil abatement action may impose a greater threat to free speech than subsequent punishment for the violation of criminal obscenity laws. The Supreme Court has said that "the regulation of a communicative activity *** must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and *** the burden of supporting an injunction *** is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." Universal Amusement Co. v. Vance (1980), 445 U.S. 308, 316, 100 S.Ct. 1156, 1161.

Ohio's nuisance abatement scheme provides for the one year closure of any "place" where a nuisance is found to exist. The Ohio Supreme Court has held that R.C. Chapter 3767 provides a constitutionally permissible method of controlling the exhibition of obscene films.[5] State ex rel.

---

[5] Many jurisdictions have found similar one year closing provisions invalid or overbroad as applied. See, e.g., City of Paducah v. Investment Entertainment, Inc. (C.A.6, 1986), 791 F.2d 463, 467; Cornflower Entertainment, Inc. v. Salt

Ewing v. "Without a Stitch" (1974), 37 Ohio St.2d 95, paragraph three of the syllabus, dismissed sub nom., Art Theater Guild, Inc. v. Ewing (1975), 421 U.S. 923, 95 S.Ct. 1649. The supreme court emphasized, however, that the abatement provisions must be carefully applied. The release provisions found in R.C. 3767.04 were critical to the supreme court's conclusion that Ohio's nuisance abatement scheme was constitutional. The court emphasized that "[t]he release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint on an activity generally protected by the First

---

Lake City Corp. (D.Utah, 1980), 485 F.Supp. 777; People ex rel. Busch v. Projection Room Theatre (1976), 17 Cal.3d. 42, 550 P.2d 600, certiorari denied sub nom., Van De Kamp v. Projection Room Theatre, 429 U.S. 922, 97 S.Ct. 320; Sanders v. State (1974), 231 Ga 608, 203 S.E.2d 153 (statute permitting abatement on trial court finding that bookstore sold obscene material was overbroad on its face); Jefferson v. Bayou Landing, Ltd. (La. 1977), 350 So.2d 158; State ex rel. Field v. Hess (Okla. 1975), 540 P.2d 1165 (permanent injunction was overbroad and was modified to enjoin sale of particular works used as exhibits at trial); Ranck v. Bonal Enterprises, Inc. (Pa. 1976), 359 A.2d 748 (law provides too vague a standard for determining line between protected and unprotected speech). But, see, State ex rel. Kidwell v. U.S. Marketing, Inc. (1981), 102 Idaho 451, 631 P.2d 622, appeal dismissed sub nom., U.S. Marketing, Inc. v. Idaho (1982), 455 U.S. 1009, 102 S.Ct. 1649 (law providing for a one year closure was intended to penalize past distribution of obscene material and was no more a prior restraint than a fine or imprisonment available after a criminal proceedings).

Amendment." Id. at 105 (emphasis added). The United States Supreme Court has also emphasized the importance of the release provisions to the constitutional application of Ohio's nuisance abatement provisions. Huffman v. Pursue, Ltd. (1975), 420 U.S. 592, 612, 95 S.Ct. 1200, 1212, fn. 23.

"Without a Stitch" involved the exhibition of an obscene film, not the distribution of obscene material. The Ohio First District Court of Appeals, however, has considered the nuisance abatement scheme in this context. State ex rel. Leis v. William S. Barton Co. (1975), 45 Ohio App.2d 249. In Barton Co., the Hamilton County prosecutor filed a civil action against a bookstore to abate a nuisance involving the sale of allegedly obscene material. After a trial, the trial court found the material obscene and closed the store for one year. The trial court subsequently refused to release the closing order without specific guarantees that no further nuisance would occur on the property. On appeal, the appellate court explained that

> where a property owner undertakes or proffers the understanding of three actions - 1) payment of the tax and costs of the abatement action, 2) the filing of a bond in the full value of the property, and 3) a demonstration that he will not exhibit the particular items declared to be obscene - the trial court must release the closure order.

Id. at 254 (emphasis in original). The appellate court concluded that any requirement that an owner refrain from exhibiting materials that had not been judicially determined obscene would constitute an unconstitutional prior restraint. Id.

The decisions in "Without a Stitch" and Barton Co.

establish a civil abatement action as a proper vehicle to curb dissemination of obscene material. Both decisions, however, also emphasize the necessity to narrowly interpret the nuisance abatement provisions where presumptively protected expressive material is involved. Compare State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals (1992), 63 Ohio St.3d 354, 362 (sexual activity resulting in sanctions did not involve First Amendment freedoms of speech or activity).

In light of the difficult constitutional issues here, this court must carefully consider the scope of the trial court's closing order. The first step is to review the trial court's discretion over that order. R.C. 3767.06 provides in part:

> If the existence of a nuisance is admitted or established *** an order of abatement shall be included in the judgment entry ***. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance *** and [if a closing order has not previously been issued] shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released.

(Emphasis added). R.C. 3767.01 defines "place" as "any building, erection, or place or any separate part or portion thereof or the ground itself[.]" (Emphasis added.)

The broad definition of "place" in R.C. Chapter 3767 provides the trial court with discretion to tailor an

abatement order to the specific nuisance. Where expressive material is at issue, the proper exercise of this discretion is critical. See Vance, 445 U.S. at 316, 100 S.Ct. at 1161. See, also, State ex rel. Konstam v. Video Studio, Inc. (Apr. 28, 1994), Richland App. No. 93-CA-38, unreported at 17-18, dismissed 70 Ohio St.3d 1454 (trial court commended for tailoring its closing order to have least restrictive effect on dissemination of First Amendment protected material).

Here, the trial court ordered Rhonemus' entire business closed for one year based upon the rental of two obscene videotapes. The trial court made no attempt to limit its abatement order to the nuisance. This undisciplined application of a nuisance abatement order poses a significant risk to speech protected under the First Amendment. The court now holds that the trial court abused its discretion by issuing an overly broad closing order. The cause must be remanded to the trial court for a new abatement order that is narrowly tailored to the nuisance. Rhonemus' fourth assignment of error is sustained in part.

To summarize this court's decision, the trial court did not err in dismissing Rhonemus' suppression motion or her request for a declaratory judgment. The trial court erred in entering an ex parte temporary restraining order on March 6, 1995, but that error is no longer reversible. The trial court did not err in proceeding with the civil nuisance abatement proceedings, in refusing to empanel an advisory jury, and in concluding that the two videotapes at issue were obscene. The trial court, however, did error in dismissing Rhonemus' Section 1983 complaint against Prosecutor Eckstein. On remand, that complaint must be reinstated. The trial court also abused its discretion by applying its abatement order too broadly. On remand, the trial court must tailor its abatement order to the nuisance. Rhonemus has not directly challenged the trial court's

determination that the release provisions of R.C. 3767.04 do not apply to a lessee. This court offers no opinion on that issue.

Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

KOEHLER AND WALSH, JJ., concur.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO ex rel. STEVEN H. ECKSTEIN,	:	
		Case No. CA96-05-014
Plaintiff-Appellee,	:	
-vs-	:	JUDGMENT ENTRY
VIDEO EXPRESS, et al.,	:	(Filed Apr. 28, 1997)
Defendants-Appellants	:	

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with the opinion filed the same date as this judgment entry.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed fifty percent against appellants and fifty percent against appellee.

To all of which all parties, by their counsel, except.

/s/ William W. Young
William W. Young, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ James E. Walsh
James E. Walsh, Judge

THE SUPREME COURT OF OHIO

1997 TERM

State of Ohio ex rel. Steven H. Eckstein, Appellee,	:	Case No. 97-1184
v.	:	ENTRY
Video Express, et al., Appellants.	:	(Filed Sep. 3, 1997)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray & DeVan.

(Fayette County Court of Appeals; No. CA9605014)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEA
FAYETTE COUNTY, OHIO

STATE OF OHIO, EX REL.
STEVEN H. ECKSTEIN
Plaintiff

CASE NO 950065 CVH

vs.

AMENDED ORDER

VIDEO EXPRESS, et al.
Defendants.

(Filed July 1, 1997)

: :

Pursuant to the Mandate of The Twelfth District Court of Appeals, the Court's Order of April 26, 1996 is amended to read as follows:

To: Sheriff, Fayette County, Ohio

YOU ARE HEREBY ORDERED to remove from the premises at 221 Eyman Park Dr., Washington Court House, Ohio, known as the Video Express video store, the following personal property: the videotapes entitled "Black Stocking" and "Everything Butts", one shelf in the adult videotape area of the store, one shelf behind the counter in the general area of the store, the cas register, and the counter itself.

The above personal property shall be sold, except for the video tapes, without appraisal, at a public auction to the highest bidder for cash. Said proceeds from the sale shall be applied as per R.C. §3767.09.

YOU ARE FURTHER ORDERED to effectually close that portion of the premises at 221 Eyman Park Dr., Washington Court House, Ohio, known as the Video Express video store in which the adult films are located (also known as the Back Room), against its use for any purpose and to keep the same closed for one year, commencing April 26, 1996.

/s/ Victor Pontious
Judge

IN THE COURT OF COMMON PLEAS,
FAYETTE COUNTY, OHIO

STATE OF OHIO, EX REL,
STEVEN H. ECKSTEIN
Plaintiff

CASE NO. 950065 CVH

vs.

ORDER

VIDEO EXPRESS, et al.
Defendants.

(File Apr. 26, 1995)

: :

To: Sheriff, Fayette County, Ohio

YOU ARE HEREBY ORDERED to remove from the premises at 221 Eyman Park Dr., Washington Court House, Ohio, known as the Video Express video store, the following personal property: the videotapes entitled "Black Stockings" and "Everything Butts", one shelf in the adult videotape area of the store, one shelf behind the counter in the general area of the store, the cash register, and the counter itself.

The above personal property shall be sold, except for the video tapes, without appraisal, at a public auction to the highest bidder for cash. Said proceeds from the sale shall be applied as per R.C. §3767.09.

YOU ARE FURTHER ORDERED to effectually close the premises at 221 Eyman Park Dr., Washington Court House, Ohio, known as the Video Express video store, against its use for any purpose and to keep the same closed

for one year, commencing on the filing date of this order unless sooner released as provided by law.

/s/ Victor Pontious
Judge

IN THE COURT OF COMMON PLEAS
FAYETTE COUNTY, OHIO

TATE, EX REL., STEVEN H. ECKSTEIN	)	CASE NO. 95 0065 CVH
Plaintiff,	)	JUDGE VICTOR PONTIUS
-vs-	)	
VIDEO EXPRESS, INC., et al.,	)	NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE
Defendants.	)	
	)	(Filed Aug. 22, 1997)

Now comes the Defendant, Lorrie Rhonemus, by and through counsel and herein gives notice that she dismisses her counterclaim against the Plaintiff, without prejudice, pursuant to rule 41(A)(1) of the Ohio Rules of Civil Procedure.

Respectfully submitted,

_____

J. MICHAEL MURRAY (0019626)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245

Attorney for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Dismissal was served upon David G. Jennings and Timothy S. Rankin, Attorneys for Plaintiff, at Isaac, Brant, Ledman & Teetor, L.P.A., 250 East Broad Street, Suite 900, Columbus, Ohio 43215 via facsimile number 1-(614)-365-9516 and regular United States mail, sufficient postage affixed, this _____ day of August, 1997.

_____

J. MICHAEL MURRAY (0019626)
BERKMAN, GORDON, MURRAY & DeVAN

Attorney for Defendant

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * *

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United states, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

* * * *

OHIO REV. CODE

3767.01 Definitions

As used in all sections of the Revised Code relating to nuisance:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is

conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

3767.02 Nuisance

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

3767.03 Abatement of nuisance; bond

Whenever a nuisance exists, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists; the prosecution attorney of the county in which the nuisance exists; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal office of the municipal corporation;

the prosecuting attorney; or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it. If an action is instituted under this section by a person other than the prosecuting attorney; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; or the attorney general, the complainant shall execute a bond in the sum of not less than five hundred dollars, to the defendant, with good and sufficient surety to be approved by the court or clerk of the court, to secure to the defendant any damages he may sustain and the reasonable attorney's fees he may incur in defending the action if the action is wrongfully brought, not prosecuted to final judgment, is dismissed, or is not maintained, or if it is finally decided that an injunction should not have been granted or if the action was wrongfully brought, not prosecuted to final judgment, dismissed, or not maintained, the defendant shall have recourse against the bond for all damages suffered, including damages to his property, person, or character, and for the reasonable attorney's fees incurred by him in defending the action.

3767.04 Procedure in injunction action

(A) The civil action provided for in section 3767.03 of the Revised Code shall be commenced in the court of common pleas of the county in which the nuisance is located. At the commencement of the action, a complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

(B)(1) After the filing of the complaint, an application for a temporary injunction may be filed with the court or a judge of the court. A hearing shall be held on the application within ten days after the filing.

(2) If an application for a temporary injunction is filed, the court or a judge of the court, on application of the complainant, may issue an ex parte restraining order restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist until the decision of the court or judge granting or refusing the requested temporary injunction and until the further order of the court. The restraining order may be served by handing it to and leaving a copy of it with any person who is in charge of the place where the nuisance is alleged to exist or who resides in that place, by posting a copy of it in a conspicuous pace at or upon one or more of the principal doors or entrances to that place, or by both delivery and posting. The officer serving the restraining order forthwith shall make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining the nuisance. Any violation of the restraining order is contempt of court, and, if the order is posted, its mutilation or removal while it remains in force is a contempt of court, provided the posted order contains a notice to that effect.

(3) A copy of the complaint, a copy of the application for the temporary injunction, and a notice of the time and place of the hearing on the application shall be served upon the defendant at least five days before the hearing. If the hearing then is continued on the motion of any defendant, the requested temporary injunction shall be granted as a matter of course. If, upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. Except as provided in division (C) of this section, if at the time of granting the temporary injunction it further appears that the person owning, in control, or in charge of the nuisance

so enjoined had received five days' notice of the hearing and unless that person shows to the satisfaction of the court or judge that the nuisance complained of is abated or that he proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge forthwith shall issue an order closing the place against its use for any purpose of lewdness, assignation, prostitution, or other prohibited conduct until a final decision is rendered on the complaint for the requested permanent injunction. Except as provided in division (C) of this section, the order closing the place also shall continue in effect for that further period any restraining order already issued under division (B)(2) of this section, or, if a restraining order was not so issued, the order closing the place shall include an order restraining for that further period the removal or interference with the personal property and contents located in the place. The order closing the place shall be served and an inventory of the personal property and contents situated in the place shall be made and filed as provided in division (B)(2) of this section for restraining orders.

(C) The owner of any real or personal property closed or restrained or to be closed or restrained may appear in the court of common pleas between the time of the filing of the complaint for the permanent injunction described in division (A) of this section and the hearing on the complaint, and, if all costs incurred are paid and if the owner of the real property files a bond with sureties approved by the clerk, in the full value of the real property as ascertained by the court or, in vacation, by the judge, and conditions that the owner of the real property immediately will abate the nuisance and prevent it from being established or keep until the decision of the court or judge is rendered on the complaint for the permanent injunction, the court or judge in vacation, if satisfied of the good faith of the owner of the personal property of any knowledge of the use of the personal property as a nuisance

and that, with reasonable care and diligence, the owner of the personal property could not have known of its use as a nuisance, shall deliver the real or personal property, or both, to the respective owners and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing the real property or restraining the removal or interference with the personal property. The release of any real or personal property under this division shall not release it form any judgment, lien, penalty, or liability to which it may be subjected.

3767.05 Priority of action; evidence; costs

(A) The civil action provided for in section 3767.03 of the Revised Code shall be set down for trial and shall have precedence over all other cases except those involving crimes, election contests, or injunctions. In the civil action, evidence of the general reputation of the place where the nuisance is alleged to exist or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, assignation, or other prohibited conduct at the place is admissible for the purpose of proving the existence of the nuisance and is prima-facie evidence of the nuisance and of knowledge of and of acquiescence and participation in the nuisance on the part of the person charged with maintaining it.

(B) If the complaint for the permanent injunction is filed by a person who is a citizen of the county, it shall not be dismissed unless the complainant and his attorney submit a sworn statement setting forth the reasons why the civil action should be dismissed and the dismissal is approved by the prosecuting attorney in writing or in open court. If the person who files the complaint for the permanent injunction is a citizen of the county, if that person refuses or otherwise fails to prosecute the complaint

to judgment, and if the civil action is not dismissed pursuant to this division, then, with the approval of the court, the attorney general, the prosecuting attorney of the county in which the nuisance exists, or the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists, may be substituted for the complainant and prosecute the civil action to judgment.

(C) If the civil action is commenced by a person who is a citizen of the county where the nuisance is alleged to exist and the court finds that there were not reasonable grounds or cause for the civil action, the costs may be taxed to that person.

(D) If the existence of the nuisance is established upon the trial of the civil action, a judgment shall be entered that perpetually enjoins the defendant and any other person form further maintaining the nuisance at the place complained of and the defendant from maintaining the nuisance elsewhere.

3767.06 Content of judgment and order; attorney general nuisance abatement fund; proceeds from sale of property seized applied to costs of actions

(A) If the existence of nuisance is admitted or established in the civil action provided for in section 3767.03 of the Revised Code or in a criminal action, an order of abatement shall be included in the judgment entry under division (D) of section 3767.05 of the Revised Code. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance and not already released under authority of the court as

provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at a public auction to the highest bidder for cash. The order also shall require the renewal for one year of any bond furnished by the owner of the real property under section 3767.04 of the Revised Code; if a bond was not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction; or, if a closing order was not then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may appear and obtain a release in the manner and upon fulfilling the requirement provided in section 3767.04 of the Revised Code. The release of property under this division shall not release it from any judgment, lien, penalty, or liability to which it may be subject.

(B) Owners of unsold personal property or contents seized pursuant to division (A) of this section shall appear and claim the personal property or contents within ten days after the order of abatement is issued and prove to the satisfaction of the court their lack of any actual knowledge of the use of the personal property or contents in the conduct or maintenance of the nuisance and that with reasonable care and diligence they could not have known of that use. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place where the nuisance is found to exist. If an owner establishes the lack of actual or constructive knowledge of the use of his personal property or contents in the conduct or maintenance of the nuisance, the unsold personal property and contents shall be delivered to the owner. If an owner does not so establish, the personal property or

contents shall be sold or otherwise disposed of as provided in division (A) of this section. For removing and selling the personal property and contents, the officer involved shall be entitled to charge and receive the same fees as he would for levying upon and selling similar property on execution. For closing the place where the nuisance is found to exist and keeping it closed, a reasonable sum shall be allowed by the court.

(C) There is hereby established in the state treasury the attorney general nuisance abatement fund. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, all proceeds form the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted by the attorney general under sections 3767.03 to 3767.11 of the Revised Code shall be deposited into the state treasury and credited to the fund. The attorney general shall use the fund solely to defray expenses and costs associated with those types of civil actions.

(D) All proceeds form the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a village solicitor, city director of law, or other similar chief legal officer of a municipal corporation initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the city or village treasury and credited to the general fund.

(E) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a prosecuting attorney initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the county treasury and credited to the general fund.

(F) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced under sections 3767.03 to 3767.11 of the Revised Code by a person who is a citizen of the county where the nuisance is found to exist initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attonrey's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the county treasury and credited to the general fund.

2907.01 Definitions

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse

between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

* * * *

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply;

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in

persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

* * * *

(J) "Material" means any book magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

2907.32 Pandering obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

(3) Create, direct, or produce any obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Buy procure, possess, or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist,

sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

2913.02 Theft; aggravated theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

PROPOSITION OF LAW NO. 1

THE STATE'S UNAUTHORIZED COPYING OF VIDEOTAPES RENTED FROM A VIDEO RENTAL ESTABLISHMENT, ABSENT A WARRANT, CONSENT OR EXIGENT CIRCUMSTANCES, CONSTITUTES AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT AND ART. I, §14 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. 2

EXPRESSIVE MATERIALS UNLAWFULLY SEIZED IN CONNECTION WITH THE PROSECUTION OF A CIVIL NUISANCE ACTION MUST BE SUPPRESSED AS EVIDENCE.

STATEMENT OF ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT RHONEMAUS' COUNTERCLAIM AND IN STRIKING HER JURY DEMAND.
See R. 18.

II. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANTS' MOTION TO SUPPRESS AND/OR IN LIMINE BECAUSE COPYING VIDEOTAPES BELONGING TO VIDEO EXPRESS, A COMMERCIAL ESTABLISHMENT OPERATED BY LORRIE RHONEMUS, ABSENT A WARRANT, CONSENT OR OTHER EXIGENT CIRCUMSTANCES, WAS AN ILLEGAL SEIZURE THAT VIOLATES THE FIRST, FOURTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS ART. I, §§11 AND 14 OF THE OHIO CONSTITUTION.
See Tr. 113.

III. THE TRIAL COURT ERRED IN ISSUING AN *EX PARTE* TEMPORARY RESTRAINING ORDER WHICH PROHIBITED THE APPELLANTS FROM RENTING TWO VIDEOTAPES PRESUMPTIVELY PROTECTED BY THE STATE AND FEDERAL CONSTITUTIONS.
See R. 1.

IV. THE TRIAL COURT ERRED IN ORDERING VIDEO EXPRESS CLOSED FOR A PERIOD OF ONE YEAR SINCE THE CLOSURE ORDER WAS AN UNCONSTITUTIONAL PRIOR RESTRAINT.
See R. 24.

V. THE TRIAL COURT ERRED IN FINDING THE APPELLANTS HAD REPEATEDLY VIOLATED OHIO'S PANDERING OBSCENITY STATUTE.
See Tr. 247.

VI. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANTS' MOTION FOR AN ADVISORY JURY.
See generally.

VII. THE TRIAL COURT ERRED IN FINDING THE VIDEOTAPES TITLED "BLACK STOCKINGS" AND "ANYTHING BUT" TO BE OBSCENE.
See Tr. 247.

Supreme Court, U.S.
FILED
DEC 31 1997
CLERK

(2)

No. 97-919

In The
Supreme Court of the United States
October Term, 1997

LORRIE RHONEMUS AND VIDEO EXPRESS,
Petitioners,

vs.

STATE OF OHIO, ex rel. STEVEN H. ECKSTEIN,
Respondent.

On Petition For A Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN H. ECKSTEIN
(Counsel of Record)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(614) 335-0888
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The respondent is satisfied with the petitioner's statement of the question.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Ohio respectfully requests this court to deny the petition for a writ of certiorari seeking review of a denial of a petition for a writ of certiorari by the Supreme Court of Ohio of a decision of the Court of Appeals, Fayette County, Ohio, upholding a finding of nuisance for repeat violation of Ohio's pandering obscenity statute in the Common Pleas Court, Fayette County, Ohio.

STATEMENT OF THE CASE

On the instructions of the Fayette County, Ohio prosecuting attorney an investigator of that office rented two sexually explicit videotapes from the petitioner's inventory of over 300 sexually explicit titles available for rent. During the rental periods he made one copy of each tape for the purpose of using the copy as evidence. The copies were entered into evidence in a nuisance action brought against the Video Express by the prosecuting attorney alleging repeat violations of Ohio's pandering obscenity statute for its rental of the two videotapes. The trial court, after viewing the tapes, found them obscene under state statute and the Miller test and the Video Express was declared a nuisance.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioners contend their right to be free from unreasonable seizures under the First, Fourth and Fourteenth Amendments was violated when the investigator copied the rented videotape in order to use it as evidence in the nuisance action. They further contend the copied tapes should therefore be excluded from evidence in the nuisance action. If so excluded, the trial court's finding of nuisance would have to be reversed as there would then be no other evidence upon which to base its decision that

the tapes were obscene. The state relied upon the tapes themselves to establish the contemporary community standards under the Miller test. The respondent disagrees the petitioner's rights were violated, as there was no meaningful interference with any possessory interest of the petitioner, that is there was no seizure. Therefore the exclusionary rule does not apply and the trial court's finding of nuisance should stand.

Under Fourth Amendment law a seizure occurs when there is a meaningful interference with any possessory interest *of the petitioners* in such property. Absent one or both there cannot be a seizure. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). This Court has also stated that absent some action taken by government agents that could properly be classified as a search or a seizure, the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply. (The Fourth Amendment rule referred to is the rule against prior restraints). Further, no case renders invalid under the First or Fourth Amendments the purchase of a few of a large number of magazines offered for sale. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches and seizures does not come into play in cases where the merchandise is purchased. *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). Therefore, unless there is a seizure there is no special protection afforded presumptively protected material.

The rule against prior restraint requires that three safeguards must be met before a prior restraint can be upheld. First, the burden of instituting judicial proceedings must be on the state. Second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo. Third and finally, a prompt judicial determination must be assured before a final restraint is placed on the dissemination of the material. *Southeastern Promotions, Ltd. v.*

Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). In this case had the prosecuting attorney decided not to institute proceedings there would have been no restraint whatsoever on the videotapes, the status quo would have been preserved, and there would have been no final restraint. An interesting twist!

Further, this Court has held that the Fourth Amendment proscription against unreasonable seizures must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or in respect to another kind of material. The question to be resolved is whether the seizure of a film without a warrant was unreasonable under Fourth Amendment standards and if so whether a film so seized is therefore inadmissible at trial. The seizure of contraband or stolen goods are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizures under Fourth and Fourthteenth Amendment standards. The common thread running through prior cases is to be found in the nature of the materials seized and the setting in which they were taken. In each case the material seized arguably fell within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Such a taking without a warrant is plainly a form of prior restraint and is, in those circumstances, unreasonable under the Fourth Amendment. It is unreasonable, not simply because it would have been easy to get a warrant, but rather because prior restraint of the right of expression, whether books or films, calls for a higher hurdle in the evaluation of reasonableness. *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). Therefore, if there was a seizure herein by the copying of the videotapes it was reasonable as it did not bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition.

This is closely related to preserving the status quo, step two of the rule against prior restraints.

In the instant case, the Ohio appellate court reasoned that there was no violation of the petitioner's right to privacy herein, i.e., no search. The court further stated the critical issue was whether there was a meaningful interference with the petitioner's possessory interest in the property seized. *See* petitioner's petition at App. 3. The appellate court found from the evidence that the state did not violate any express terms of the rental agreement. This is contrary to the contention of the petitioner. *See* petition p. 13. The court further found there was no indication that Rhonemus held *any* copyright over the contents of the videotapes. The respondent argues that this applies most especially to the right as to the copying of materials since that was the right arguably interfered with Therefore, Rhonemus did not establish that any possessory interest she held was violated. Finally, the court found Rhonemus did not offer any other compelling explanation of how the state compromised her possessory interest in the videotapes. The appellate court concluded that the trial court did not err therefore in refusing to suppress the copied videotapes as evidence as there was no seizure.

CONCLUSION

A meaningful interference with a possessory interest in property means more than renting a videotape and copying it for use as evidence. This is so especially in light of the special protections afforded presumptively protected First Amendment material called the rule against prior restraint. This rule establishes whether a seizure of expressive material is reasonable. In it a taking by the state must not bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition of the presumptively protected material. There are no other

special protections. This prohibition places an added burden on law enforcement to ensure that expressive material remains in circulation until a final judicial determination as to its status as obscenity or not. Thus law enforcement officers must figure out ways to present expressive material to magistrates while not violating individual rights.

The petitioner herein objects to the copying of the videotape, not because of any prior restraint, and not because of any interference with any possessory interests but because law enforcement has figured out a way around the cumbersome and tricky method of presenting expressive material for judicial review without substantial effort. If upheld on appeal this method could substantially increase the efforts of law enforcement against hard-core pornography because of the ease of presenting the material. The respondent says that this is laudatory as the proliferation of hard-core pornography has been on the one hand due to the extra protections that many feel are highly specialized and full of pitfalls for the unwary officer. By denying this petition this Court will signal a new way to proceed in these cases.

Respectfully submitted,

STEVEN H. ECKSTEIN
(*Counsel of Record*)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(614) 335-0888

Attorney for Respondent